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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-2043

MASONITE CORPORATION AND
ROBERT E. PAUL,
Petitioners,

v.

ANDRE HENDRY,
Respondent,

No. 71-2005

MASONITE CORPORATION AND
ROBERT E. PAUL,
Petitioners,

v.

VANDER L. LEE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Masonite Corporation and Robert E. Paul, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 1, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is found at 455 F. 2d 955 (5th Cir. 1972), and appears in Appendix A, Page 15. Both of these cases were appealed from the United States District Court for the Southern District

of Mississippi, Hattiesburg Division, but no opinions were reported in the reporter system. Judge Dan M. Russell, Jr. wrote an opinion which is set forth in Appendix B, Page 19, in the Vander L. Lee case, No. 71-2005.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 1, 1972. See Appendix C, Page 22. A timely petition for rehearing and for rehearing en banc was denied on June 14, 1972, (see Appendix D, Page 24), and this petition for certiorari was filed by September 12, 1972.

This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

When these two lawsuits were filed in the Circuit Court of the Second Judicial District of Jones County, Mississippi, there were three defendants named: Masonite Corporation, Robert E. Paul, and Jesse W. White. Jesse W. White was at that time a citizen of Mississippi and a resident thereof. Jesse W. White died on November 21, 1970, and within thirty days thereof, these cases were removed to the District Court for the Southern District of Mississippi. So when these cases were removed, there were only two defendants, the petitioners, Masonite Corporation and Robert E. Paul.

The District Court held that diversity of citizenship existed between the parties to the lawsuits, and therefore, it had jurisdiction of these cases. The determination of the District Court hinged on the question of the domicile of Robert E. Paul at the time he was served with process in the state court lawsuits. The United States Court of Appeals for the Fifth Circuit reversed and remanded the cases to the Circuit Court of the Second Judicial District of Jones County, Mississippi, based upon a finding that Robert E. Paul's domicile at the time of the service of process on him in the state court suits was Mississippi, and not Illinois, as alleged by your petitioners.

The questions presented are:

1. Was there the requisite diversity jurisdiction in the lower Federal Court when both of these cases were removed to the Federal District Court for the Southern District of Mississippi, Hattiesburg Division, from the Circuit Court of the Second Judicial District of Jones County, Mississippi?

2. Does the death of a resident defendant sufficiently remove him from the proceedings in such a manner that diversity jurisdiction can be created, provided diversity of citizenship exists between the remaining parties to the lawsuit?

STATUTES INVOLVED

The statutes involved are 28 U.S.C., Sec. 1332 (1964) which is set forth in Appendix E at page 25; 28 U.S.C., Sec. 1441 (1948) set forth in Appendix F at Page 26; and 28 U.S.C., Sec. 1446 (1965) set forth in Appendix G at Page 27.

STATEMENT OF THE CASE

The respondents, Andre Hendry and Vander L. Lee, both commenced a separate action for malicious prosecution in the Circuit Court of the Second Judicial District of Jones County, Mississippi, against Masonite Corporation, Robert E. Paul, and Jesse W. White. In Vander L. Lee's suit, personal service of process was obtained on Robert E. Paul on June 13, 1970. In Andre Hendry's case, personal service of process was had on Robert E. Paul on June 2, 1970. Masonite Corporation and Robert E. Paul filed their answer and defenses in both of these cases in the State Court. No answer or defenses were filed on behalf of Jesse W. White, who at the time of his death was a patient in a state mental institution in Mississippi. Jesse W. White died on November 21, 1970.

On December 18, 1970, Masonite Corporation and Robert E. Paul filed a petition for removal to the Federal District Court for the Southern District of Mississippi,

along with other appropriate documents. The Honorable Judge Walter L. Nixon, Jr., upon a motion for summary judgment in the Andre Hendry case, determined that Robert E. Paul's domicile at the time he was served with process was Illinois, and therefore, Andre Hendry's motion to remand upon the grounds of there being no diversity of citizenship was not well taken. Andre Hendry's motion to remand was denied and, on motion for summary judgment in that case Judge Nixon determined that the Masonite Corporation and Robert E. Paul were entitled to a summary judgment based upon the accompanying affidavits.

The Honorable Judge Dan M. Russell, Jr., having the matter in the Vander L. Lee case submitted to him on the pleadings, affidavits, oral argument and briefs of counsel, determined that Vander Lee's motion to remand was not well taken and was, therefore, denied; and upon Masonite Corporation and Robert E. Paul's motion for summary judgment, Judge Russell decided that the Masonite Corporation and Robert E. Paul were entitled to summary judgment in their favor. Orders were entered by both judges reflecting summary judgments in favor of Masonite Corporation and Robert E. Paul.

Andre Hendry and Vander L. Lee thereupon appealed the decisions of these honorable judges to the United States Court of Appeals for the Fifth Circuit. That Court, in its opinion, quoted at length from the affidavit of Robert E. Paul, made just prior to the time the petition for removal was filed. Based upon the affidavit of Paul and the affidavit of the Circuit Clerk of Jones County, Mississippi, the United States Court of Appeals for the Fifth Circuit decided that Paul's domicile was in Mississippi at the time he was served with process in the first suit, the Andre Hendry suit, and thereupon reversed and remanded these cases to the State Court.

The affidavit of Robert E. Paul is set out in Appendix H at Page 29, and the affidavit of Donice V. Knight is set forth in Appendix I at Page 31. It was upon these affidavits that the Federal District Court based its opinions.

The Federal District Court assumed as a basis of jurisdiction diversity of citizenship under 28 U.S.C., Sec. 1332 (1964), determining in the process that Robert E. Paul was a citizen of Illinois at the time of service of process, and therefore complete diversity of citizenship existed between the plaintiffs and both nonresident defendants.

REASONS FOR GRANTING THE WRIT

The decision below, as it pertains to domicile, should be reviewed because it erroneously interprets the law of domicile as enunciated by this Court, and therefore is in direct conflict with the decisions of this Court dealing with the law of domicile, and a change thereof, and it is also in direct conflict with the decisions of other Circuit Courts of Appeal in construing the law of domicile. In addition, this decision creates a nonuniformity of the decisions within the Court of Appeals for the Fifth Circuit regarding the law of domicile. Although it is true that the lower court did not reach the second important question, dealing with the effect of the death of a resident defendant on diversity jurisdiction, your petitioners ask that this Court consider only the question of domicile and a change thereof. Your petitioners would respectfully submit that this case is a proper one for summary disposition because the questions presented are easily separable, one pertaining to domicile, of which review is requested, and the other question pertaining to the effect that death of a resident defendant has on the removability of a case from state court to federal court. The lower court did not reach this second question. See the opinion of the Court of Appeals for the Fifth Circuit in Appendix A, Page 15 [455 F. 2d 955 (5th Cir. 1972)].

Your petitioners respectfully urge that the decision of the Court of Appeals for the Fifth Circuit be reversed by summary disposition as it pertains to the law of domicile, and, if this Court deems it necessary, remand these cases to the lower court for a determination of the effect that the death of a resident defendant might have on diversity jurisdiction had that defendant been the only

defendant whose citizenship destroyed diversity jurisdiction. In their attempt to show that the decision of the Court of Appeals for the Fifth Circuit is erroneous and contrary to the law established by this Court pertaining to domicile, your petitioners would cite first the cases of **Mitchell v. United States,** 21 Wall. 350 (1874), and **Texas v. Florida,** 306 U.S. 398 (1939). In the **Mitchell** case, **supra,** this Court said:

> "To constitute the new domicile, two things are indispensable; first, residence in the new locality; and, second, the intention to remain there. The change cannot be made except **facto et animo.** Both alike are necessary . . . ." 21 Wall. at p. 353.

In the case of **Texas v. Florida, supra,** this Court said:

> "Residence in fact coupled with the purpose to make the place of residence one's home, are the essential elements of domicile." 306 U.S. at p. 424.

And in the case of **Gilbert v. David,** 235 U.S. 561 (1915), Mr. Justice Day said:

> "If the plaintiff was domiciled in the State of Michigan when this suit was begun, he was a citizen of that state within the meaning of the Judicial Code. Morris v. Gilmer, 129 U.S. 315, 32 L.ed. 690, 9 Sup. Ct. Rep. 289; Williamson v. Osenton, 232 U.S. 619, 624, 58 L.ed 758, 761, 34 Sup. Ct. Rep. 442 . . . .
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> • • • •
>
> 'If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed present domicil, it is to be deemed his place of domicil, . . . The requisite animus is the present intention of permanent or indefinite residence in a given place or country, or, negatively expressed, the absence of any present intention of not residing there permanently or indefinitely.' . . . . 235 U.S. at pp. 569, 570.

Another case wherein the indicia of domicile and the law pertaining to domicile were enunciated was **District of Columbia v. Murphy,** and its companion case of **District**

of **Columbia v. Hart**, 314 U.S. 441 (1941). These cases support the general propositions cited above and are mentioned here for the excellent discussion on domicile at 314 U.S. beginning at page 453.

Taking the general principles of law as announced by this Court and applying them to the undisputed factual situation in the cases here under consideration, your petitioners strongly urge that the decision of the Court of Appeals for the Fifth Circuit, on the question of domicile, is "clearly erroneous" within the definition of that term in **Commissioner of Internal Revenue v. Duberstein**, 363 U.S. 278 (1960).[1]

The facts concerning Robert E. Paul's move are undisputed. See his affidavit, Appendix H at page 29. On April 13, 1970, he went to Chicago, Illinois, was offered a promotion and accepted it. A condition he also accepted was that he move to Chicago, Illinois, to live. He agreed to do so.[2] Paul established his office in Chicago on April 23 and 24, 1970, and occupied it beginning April 29, 1970. On May 19, 1970, he moved into an apartment at 1445 North State Parkway, Chicago, with most of his clothes and personal effects, and about that time he began looking for a home in the Chicago area. On May 18, 1970, he signed a contract with Howard Johnson, Realtor, for the sale of his house in Laurel, Mississippi. On July 15, 1970, he purchased a home in Lake Forest, Illinois and he and his family moved into the new home in early August, 1970.

The above facts are undisputed. Robert E. Paul did vote in the regular Democratic primary election held in Jones County, Mississippi, on June 2, 1970, but when the whole of Robert E. Paul's course of action, as shown in his affidavit, is considered, no real significance can attach to his voting that one time, and under the decisions

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[1]A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. **United States v. United States Gypsum Co.**, 333 U.S. 364, 395 (1948). The rule itself applies also to factual inferences from undisputed basic facts, id. 333 U.S. at 394, as will on many occasions be presented in this area. See also FRCP 52(a).

[2]It can be noted that he still lives there.

cited above, voting is not even a controlling factor in establishing domicile. See **District of Columbia v. Murphy, supra,** or **Texas v. Florida, supra.**

When Robert E. Paul formed the intention to make Illinois his new home on April 13, 1970, and physically made the move to an apartment in Chicago, Illinois on May 19, 1970, his domicile, and thus that of his family, changed instantaneously from Mississippi to Illinois. Thus when he was served with process on June 2, 1970, he was a domicilliary, and thus a citizen, of Illinois. There is no need to view Paul's change of domicile with suspicion or question in any manner his actions. He changed his domicile at a time when there was no indication whatsoever that these cases would become removable to the federal court system. His domicile changed long before Jesse W. White, the resident defendant, died on November 21, 1970. His motives for moving were solely related to his job and his promotion, and thus they can cast no suspicion on the facts as shown above. Paul's move was entirely innocent.

Your petitioners would also show that this decision of the lower court creates a conflict among the other circuits respecting the law of domicile, and in support of this point would cite first the case of **Berger v. Berger,** 210 F. 2d 403 (3d Cir. 1954). This case cites the generally accepted principles of the law of domicile as follows:

> "Generally speaking, an individual is domiciled where he maintains a fixed home to which, whenever he is absent, he has the intention of returning. Once acquired, a domicile continues until a new one is obtained. But if an individual has abandoned his domicile by departing from his home there with the intention not to return to it as a home he acquires a new domicile at the moment that he arrives at another place in which he then and there intends to make his home for an indefinite time in the future. And such an individual may acquire a new domicile in the state or territory to which he has thus come with intent to make his home there even though he has not yet selected the precise habitation within that state or territory

> in which he expects ultimately to reside. Moreover a domicile thus once acquired by an individual is not lost by a subsequent absence from the place of domicile, whether for business or pleasure, if the individual has a present and continuous intention not to make his home at the place visited but to return to his home in the place of original domicile. The fact that such absences are frequent or lengthy makes no difference if the intent to return is ever present." 210 F. 2d at p. 405 (Footnotes omitted)

Other cases decided by the Third Circuit Court of Appeals which reiterate the same general principles are **Gallagher v. Philadelphia Transportation Co.**, 185 F. 2d 543 (3d Cir. 1950), and **Korn v. Korn**, 398 F. 2d 689 (3d Cir. 1968).

The Court of Appeals for the Eighth Circuit follows the above principles. See for example, **Spurgeon v. Mission State Bank**, 151 F. 2d 702, 705 and 706 (8th Cir. 1945), wherein the Court said:

> "To acquire a domicil of choice, the law requires the physical presence of a person at the place of the domicil claimed, coupled with the intention of making it his present home. When these two facts concur, the change in domicil is instantaneous . . . . (T)he motive prompting is immaterial." 151 F. 2d at pp. 705 and 706.

To the same effect are **Ellis v. Southeast Construction Co., Inc.**, 260 F. 2d 280 (8th Cir. 1958) and **Janzen v. Goos**, 302 F. 2d 421 (8th Cir. 1962).

Likewise, the Court of Appeals for the Fourth Circuit has followed the above principles. See the case of **Wehrle v. Brooks**, 269 F. Supp. 785, aff'd per curiam 379 F. 2d 288 (4th Cir. 1967). A federal district court in California (9th Circuit) followed the same principles in the case of **Gallagher v. United States**, 66 F. Supp. 743 (N.D. Cal. 1946).

In the Court of Appeals for the Tenth Circuit, the same principles of law were announced concerning domi-

cile in the case of **Mid-Continent Pipe Line Co. v Whiteley,** 116 F. 2d 871 (10th Cir. 1940), and again they were more recently announced in the case of **Johnston v. Cordell National Bank,** 421 F. 2d 1310, 1317 (10th Cir. 1970), and cases therein cited.

When the law governing a change of domicile, as announced above, is applied to the facts of these cases here, it is evident that the lower court's decision was clearly erroneous in finding Paul was domiciled in Mississippi on June 2, 1970. He had formed the requisite intent and accomplished the physical move well before that date, i.e., on May 19, 1970, when he moved into the apartment in Chicago, Illinois.

In addition to being contrary to the decisions of this Honorable Court and the decisions of the other circuits, the decision of the lower court is inconsistent with other decisions of the Fifth Circuit, and a reversal on the point of domicile is required in order to establish uniformity within the decisions in the Fifth Circuit. Petitioners would cite as an example, **Paulder v. Paulder,** 185 F. 2d 901 (5th Cir. 1950) and cases therein cited. However, there is another case that is cited frequently in other decisions dealing with domicile, and it is **Stine v. Moore,** 114 F. Supp. 761 aff'd 213 F. 2d 446 (5th Cir. 1954). Following the principles laid down in **Stine v. Moore, supra,** the conclusion that the decision in these cases below is clearly and overwhelmingly erroneous cannot be escaped. Therein, the court said:

> "It is not disputed that, until the year 1947, following his marriage in 1946, the defendant resided and had his domicile in Orange, Texas. Since then he has done many things which, on their face, tend to support the conclusion that he intended to retain his domicile in Texas, such as paying poll taxes and voting in that state, making returns and paying Louisiana income taxes as a nonresident, maintaining a residence and post-office box through which he received some of his mail at his former address in Orange, Texas, and making his federal income-tax returns from that address. **Nevertheless, he did move to Louisiana with the bona fide in-**

> **tention of remaining there permanently, which is the true test:** . . . ." (Emphasis ours) 213 F. 2d at p. 447.

The Court further said that if the defendant made the change of residence from Texas to Louisiana with the bona fide intention of making Louisiana his home, and living there permanently, then his domicile and citizenship were changed from Texas to Louisiana.

> "Residence in fact, and the intention of making the place of residence one's home, are the essential elements of domicile. Words may be evidence of a man's intention to establish his domicile at a particular place of residence, but they cannot supply the fact of his domicile there. In such circumstances, the actual fact of residence and a real intention of remaining there, as disclosed by his entire course of conduct, are the controlling factors in ascertaining his domicile. . . .
> Any person, **sui juris,** may make a bona fide change of domicile at any time. . . ."
> 213 F. 2d at p. 448.

In addition to being clearly in conflict with **Stine v. Moore, supra,** it is also contrary to the case of **Hardin v. McAvoy,** 216 F. 2d 399, 402 and 403 (5th Cir. 1955), and the many cases cited therein.

There are other cases which could have been cited which are pertinent and germane to the issue of domicile and thus to diversity of citizenship in these cases. However, the cases cited above are the most cogent examples showing the decision of the court below to be clearly erroneous on the question of domicile, and in the interest of brevity the legion of cases involving questions of domicile are not here mentioned. But from Robert E. Paul's affidavit, Appendix H, page 29, it is overwhelmingly clear and apparent, indeed, no other conclusion can be logically reached, but that in April of 1970 he formed an intent to make his domicile in Illinois, and on or about May 19, 1970, he made the physical move, and he was physically present in Illinois, residing there in an apartment in Chicago with no intention whatever

to leave. At that time, under the principles of law enunciated above, his domicile changed from Mississippi to Illinois. His wife and children took his domicile at that time also. **Weisinger v. McGehee,** 160 Miss. 424, 134 So. 148, 150 (1931) and **Yarborough v. Yarborough,** 290 U. S. 202, 211 (1933).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this is a proper case for the exercise of this Honorable Court's discretionary jurisdiction and that a summary disposition can be made herein, because the questions presented are easily separable and the decision of the Court of Appeals for the Fifth Circuit on the question of domicile is clearly erroneous and should be reversed. If necessary, this Court could then remand these cases to the lower court for a determination of the second question which was not reached concerning the effect the death of Jessie W. White had on diversity of jurisdiction.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2043

ANDRE HENDRY,
Plaintiff-Appellant,

versus

MASONITE CORPORATION and ROBERT E. PAUL,
Defendants-Appellees.

No. 71-2005

VANDER E. LEE,
Plaintiff-Appellant,

versus

MASONITE CORPORATION and ROBERT E. PAUL,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

(March 1, 1972)

George D. Maxey, Laurel, Miss., Stanford Young, Waynesboro, Miss., for Andre Hendry, plaintiff-appellant.

Quitman Ross, Laurel, Miss., for Vander E. Lee, plaintiff-appellant.

Thomas A. Bell, Joe H. Daniel, Jackson, Miss., for defendants-appellees.

Before JOHN R. BROWN, Chief Judge, and INGRAHAM and RONEY, Circuit Judges.

PER CURIAM:

The issue here is whether there was requisite diversity jurisdiction in the federal court when these cases were removed from a Mississippi state court. We hold that the district court erred in not finding that one of the defendants, Robert E. Paul, was a citizen of Mississippi at the time process was served on him, so that these cases must be reversed and remanded to the district court with instructions to remand them to the state court.

For purposes of federal diversity jurisdiction "citizenship" and domicile" are synonymous. Stine v. Moore, 213 F.2d 446 (5th Cir. 1954). In determining one's "citizenship" or "domicile" statements of intent are entitled to little weight when in conflict with facts. Welsh v. American Surety Co. of New York, 186 F.2d 16 (5th Cir. 1951).

The facts concerning the citizenship of defendant Paul are these. Until May 1, 1970, he was a vice president of the Masonite Corporation and manager in charge of its Mississippi operations with offices in Laurel, Mississippi. On April 13, 1970, Paul accepted a company promotion to Chicago, Illinois, to become effective on May 1, 1970. There is no doubt that when he accepted that promotion he then decided to move to Illinois and become a citizen there at some time. Thereafter, he was personally served on June 2, 1970, in the Hendry case and on June 13, 1970, in the Lee case. The issue is whether he had carried out his intention to move his domicile to Illinois prior to those two dates.

The facts set forth in Paul's affidavit are as follows:

"My promotion was announced to all Masonite personnel on April 24, 1970, and it became effective May 1, 1970. John S. Harper, my successor in Laurel, was appointed on April 24, 1970 and assumed his duties there on May 6, 1970. I established my office in Chicago on April 23 and 24, 1970, and occupied it beginning April 29, 1970. Thereafter, I spent most of my working time in Chicago, and I spent part of the week of May 11, 1970 at the Towanda, Pennsylvania Plant. I spent some of my time advising with John S. Harper, helping him to effectively assume his new duties. As soon as John S. Harper

arrived in Laurel, I gave up the executive offices that I had occupied, and when I had the occasion to be in Laurel, I used a small office in another location.

"On May 19, 1970, I moved into an apartment at 1445 North State Parkway, Chicago, with most of my clothes and personal effects. I also moved a number of company files into said apartment, so that I could spend my spare time there reviewing them.

"About the time that I moved into said apartment, I began looking for a home in the Chicago area. On June 5, 1970, my wife and son came up to Chicago to assist in looking for a home. I purchased a home at 491 South Beverly Place, Lake Forest, Illinois, on July 15, 1970. My household furnishings were moved into my new home in early August, 1970. I signed a contract with Howard Johnson, Realtor, for sale of my home in Laurel, on May 18, 1970.

"Beginning May 1, 1970, my salary and travel expenses were borne by the home office."

Defendant and his wife personally voted in the primary election held in Jones County, Mississippi on June 2, 1970.

Under all of the circumstances of this case, Paul proved only that at the time he was served with process, he had an intention to change his domicile at some future time. The only home he owned at the time of service was in Mississippi, all of his household furnishings were there, his family still lived there, and he still voted as a Mississippi resident. Only his working time was spent in Chicago. The burden was on Paul to show that he had changed his domicile prior to service. Stine v. Moore, supra. The evidence proves the case against him. Although in the Lee case he was served 11 days after he voted, rather than before he voted as in the Hendry case, we find no reason for distinguishing between the two. Nothing occurred after the first service and before the second which would evidence a change of domicile.

Our decision as to the citizenship of defendant Robert E. Paul controls the disposition of this case, and we

pretermit a determination of the effect that the death of defendant Jesse White might have had on diversity jurisdiction had he been the only defendant who was a citizen of Mississippi.[1]

We reverse the judgment of the lower court with instructions to remand the case to the Circuit Court of the Second Judicial District of Jones County, Mississippi.

Reversed and remanded, with instructions.

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[1]Removal was obtained only after the death of defendant Jessie White, who was a Mississippi citizen. Prior to that time apparently no one was concerned with defendant Paul's citizenship because White's citizenship clearly destroyed diversity jurisdiction.

APPENDIX "B"

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

HATTIESBURG DIVISION

VANDER L. LEE, PLAINTIFF

VERSUS CIVIL ACTION No. 2471

MASONITE CORPORATION, ET AL, DEFENDANTS

OPINION OF THE COURT

Plaintiff, Vander L. Lee, a resident of Jones County, Mississippi, originally filed his suit in the Circuit Court of Jones County, Mississippi, against Masonite Corporation, a foreign corporation, doing business in Mississippi, Robert E. Paul and Jesse White, the last two named defendants alleged to be residents of Jones County. Service of process was had on Masonite on May 25, 1970. Personal service was had on defendant Paul on June 13, 1970, in Jones County. After two unsuccessful attempts at service on Jesse White, process was finally obtained on him on August 20, 1970, by service on Dr. W. L. Jaquith, Director of Mississippi State Hospital, where White was a patient. On December 18, 1970, following White's death on November 21, 1970, defendants filed their petition to remove setting forth the fact of White's death, and claiming diversity of citizenship as to the remaining parties on the grounds that at the time of service of process on Paul he was a resident of Illinois. Plaintiff has not revived the action as to White's estate.

On December 23, 1970, plaintiff filed his motion to remand, stating no grounds therein, but submitting in support of his motion an affidavit of the Circuit Clerk and Registrar of Jones County, Mississippi, to the effect that Robert E. Paul and his wife registered to vote in Jones County on April 30, 1968, listing their residence at

1060 West 15th St., Laurel, Mississippi, and that both voted in the regular Democratic primary election held in Jones County on June 2, 1970.

Defendants resist the motion to remand, relying on Paul's affidavit attached to the petition for removal.

The matter has been submitted to the Court on the pleadings, the aforesaid affidavits, oral argument and briefs.

In his affidavit, Paul stated that he was formerly Vice President and Manager, Mississippi Operations, for Masonite Corporation, with offices in Laurel, Mississippi. On April 13, 1970, he went to Chicago to confer with the president of the corporation at the home office, and while there was offered a promotion to his present position of Vice-President — Manufacturing Building Products Division, Masonite Corporation, 29 N. Wacker Drive, Chicago, conditioned upon his moving to Chicago. He accepted. His promotion was announced to all Masonite personnel on April 24, 1970, and became effective May 1, 1970. His successor at Laurel was appointed on April 24, 1970, and assumed his duties on May 6, 1970. Affiant established his office in Chicago on April 23 and began occupancy on April 29, 1970. He remained in Chicago thereafter except for a part of the week of May 11, 1970 when he visited one of the plants under his control at Towanda, Pennsylvania, and returned to Laurel to help his successor assume his new duties. On May 19, 1970, affiant moved into an apartment in Chicago, and began looking for a home in the Chicago area. His wife and son joined him in Chicago on June 5, and on July 15, 1970, he purchased a home in Lake Forest, Illinois. On May 18, 1970, he formally put his Laurel home on the market by signing a contract with a Laurel realtor. Since May 1, 1970, his salary and travel expenses have been borne by the home office in Chicago.

As stated above, Paul was not served with process in this action until June 13, 1970, at which time he insists he was no longer a resident of Mississippi but of Illinois.

A man's domicile is determined by his intent accompanied by such actions as may evidence that intent. A

requisite element of intent to change one's domicile necessarily includes an intention to abandon the former domicile. Nothing in Paul's affidavit is controverted by plaintiff, and therefore the Court can reasonably find that his intent from the time he received notice of his promotion was to change his permanent residence from Laurel, Mississippi to Chicago, Illinois. Without repeating all his statements, he evidenced that intent by assuming his Chicago duties on May 1, 1970, moving to Chicago, sending for his family, and putting his Laurel home up for sale, all prior to the time he was served with process. The fact that he and his wife returned to Laurel to vote on June 20, 1970, is the only one indicia of residence, and is far outweighed by his other actions in establishing an Illinois residence. In **Stine v. Moore**, 213 F. 2d 446, the defendant paid poll taxes, voted, and made tax returns from Texas. Nonetheless, the court found that defendant had moved to Louisiana with the bona fide intention of remaining there permanently, which the Court found to be the true test.

In another case in this division, Civil Action No. 2470, involving the same defendants and the identical issue of Paul's residence at the time he was served with process, Judge Walter L. Nixon, Jr., recently denied plaintiff's motion to remand on the grounds that there is diversity of citizenship, his order being dated March 11, 1971.

This Court concurs in his ruling and finds that the similar motion to remand before this Court should be denied.

An order may be submitted to this effect.

Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

DATED: March 29, 1971

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-2005

D. C. Docket No. CA 2471

VANDER E. LEE,
Plaintiff-Appellant,

versus

MASONITE CORPORATION and ROBERT E. PAUL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with instructions to remand the case of the Circuit Court of the Second Judicial District of Jones County, Mississippi;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

March 1, 1972

Issued As Mandate: June 22, 1972

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT
October Term, 1971

No. 71-2043

D. C. Docket No. 2470

ANDRE HENDRY,
Plaintiff-Appellant,

versus

MASONITE CORPORATION and ROBERT E. PAUL,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with instructions to remand the case of the Circuit Court of the Second Judicial District of Jones County, Mississippi;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

March 1, 1972

Issued As Mandate: June 22, 1972

APPENDIX "D"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2043

ANDRE HENDRY,
Plaintiff-Appellant,

versus

MASONITE CORPORATION and ROBERT E. PAUL,
Defendants-Appellees.

No. 71-2005

VANDER E. LEE,
Plaintiff-Appellant,

versus

MASONITE CORPORATION and ROBERT E. PAUL,
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 1, 1972, 5 Cir., 1972, 455 F. 2d 955). (June 14, 1972)

Before BROWN, Chief Judge, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX "E"

28 U.S.C. Section 1332 (1964)

§ 1332. Diversity of citizenship; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: **Provided further,** That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico. (June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445.)

APPENDIX "F"

28 U.S.C. Section 1441 (1948)

§ 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. (June 25, 1948, c. 646, 62 Stat. 937.)

APPENDIX "G"

28 U.S.C., Sec. 1446 (1965)

§ 1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written

notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. (June 25, 1948, ch. 646, 62 Stat. 939; May 24, 1949, ch. 139, sec. 83, 63 Stat. 101; Sept. 29, 1965, Pub.L. 89-215, 79 Stat. 887.)

APPENDIX "H"

STATE OF MISSISSIPPI
COUNTY OF HINDS

AFFIDAVIT OF R. E. PAUL

I am R. E. Paul, Vice President-Manufacturing, Building Products Division, Masonite Corporation, with offices at 29 N. Wacker Drive, Chicago, Illinois. I was formerly Vice President and Manager, Mississippi Operations, for the same company, with offices in Laurel, Mississippi. In my former position I was responsible for Masonite's Manufacturing and Woodland operations in the State of Mississippi. In my new position, from my offices in Chicago, I assumed direct control of Masonite's Ukiah, California Plant and Woodlands Operations, and the Towanda, Pennsylvania Plant and Woodlands Operations, and I continued to maintain control of Masonite's Manufacturing and Woodlands Operations in the State of Mississippi.

On April 13, 1970, I went to Chicago to confer with S. S. Greeley, President of Masonite Corporation, and was then offered said promotion, if I would move to Chicago, the home office of the Company. Since this was a very fine promotion, I readily agreed to and did accept it, with the expectation of moving to Chicago at the earliest practicable time, thus leaving the State of Mississippi.

My promotion was announced to all Masonite personnel on April 24, 1970, and it became effective May 1, 1970. John S. Harper, my successor in Laurel, was appointed on April 24, 1970, and assumed his duties there on May 6, 1970. I established my office in Chicago on April 23 and 24, 1970, and occupied it beginning April 29, 1970. Thereafter, I spent most of my working time in Chicago, and I spent part of the week of May 11, 1970 at the Towanda, Pennsylvania Plant. I spent some of my time advising with John S. Harper, helping him to

effectively assume his new duties. As soon as John S. Harper arrived in Laurel, I gave up the executive offices that I had occupied, and when I had the occasion to be in Laurel, I used a small office in another location.

On May 19, 1970, I moved into an apartment at 1445 North State Parkway, Chicago, with most of my clothes and personal effects. I also moved a number of company files into said apartment, so that I could spend my spare time there reviewing them.

About the time that I moved into said apartment, I began looking for a home in the Chicago area. On June 5, 1970, my wife and son came up to Chicago to assist in looking for a home. I purchased a home at 491 South Beverly Place, Lake Forest, Illinois, on July 15, 1970. My household furnishings were moved into my new home in early August, 1970. I signed a contract with Howard Johnson, Realtor, for the sale of my home in Laurel, on May 18, 1970.

Beginning May 1, 1970, my salary and travel expenses were borne by the home office.

When this promotion was offered to me on April 13, 1970, I assumed that it would be, and as far as I know now, it was a permanent transfer, with no expectation on my part that I would, from the effective date of said promotion, ever return to Laurel, Mississippi, to live. I expeditiously made the move to Chicago into said apartment and later to said home, so as to more effectively carry out my duties in my new position. I thus intended to and did become a resident citizen of Lake Forest, Lake County, Illinois, prior to service of process on me in this case.

And further affiant sayeth nothing.

R. E. PAUL

SWORN TO AND SUBSCRIBED before me, this the 14th day of December, 1970.

Bobbie R. Mulrooney
NOTARY PUBLIC

(SEAL)

My Commission Expires Dec. 6, 1973

APPENDIX "I"

STATE OF MISSISSIPPI

JONES COUNTY

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, Donice V. Knight, Circuit Clerk of Jones County, in said state, who, having been by me first duly sworn, says on oath:

That he is and was during the whole of 1970 the duly elected, qualified and acting Circuit Clerk and Registrar of voters in Jones County, said state, and is and was the custodian of all registration and voting records of said county and that the records of his office Poll Book 4A, which is Laurel Ward Four, of District One, Second Judicial District of said county, reveal that Robert E. Paul, Registrant number 65, and Marjorie Hooke Paul, Registrant number 64, appeared and personally voted in the regular Democratic primary election held in said county on June 2, 1970. The registration book aforesaid further reveals that Robert E. Paul, who signed the Poll Book as R. E. Paul, registered to vote at the voting precinct aforesaid on April 30, 1968 and listed his occupation as "manager" and his residence address as 1060 West 15th Street, Laurel, Mississippi; and that the same Poll Book shows that Marjorie Hooke Paul, age forty two, Registrant number 64 registered on April 22, 1968, as a "housewife" whose residence address was 1060 West 15th Street, Laurel, Mississippi.

This 16th day of February, 1971.

DONICE V. KNIGHT
Circuit Clerk and Registrar
of Jones County, Mississippi

Sworn to and subscribed before me this 16th day of February, 1971.

QUITMAN ROSS
Notary Public

My commission expires February 17, 1974.